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THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS: PROBLEMS OF COEXISTENCE*

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Two of the main characteristics of the Council of Europe[1] are stressed in paragraphs (a) and (b) of article 1 of its Statute. First, the Council is a regional organization which seeks to achieve "greater unity between its Members." Second, the political philosophy upon which the Council is founded emphasizes "the maintenance and further realization of human rights and fundamental freedoms." The regional nature of the organization and the goal of protecting basic rights and freedoms within the Member States go hand in hand and cannot be dissociated; the Preamble to the Statute and articles 3, 4, 5, and 8[2] confirm this very clearly.

However, paragraph (c) of article 1 stipulates that "participation in the Council of Europe shall not affect the collaboration of its Members in the work of the United Nations," one of whose purposes also consists of "promoting and encouraging respect for human rights and for fundamental freedoms."[3]

With both the Council of Europe and the United Nations purporting to protect human rights and fundamental freedoms, how is it possible for States to take part at one and the same time in activi-

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1. For a general discussion of the Council of Europe see COUNCIL OF EUROPE, MANUAL OF THE COUNCIL OF EUROPE (1970); A. H. ROBERTSON, THE COUNCIL OF EUROPE (1961).

2. The Statute of the Council of Europe is detailed and discussed in the sources cited *supra* note 1. Articles 3, 4, 5, and 8 of the Statute require that Member States accept the aims of the organization and particularly the objective of protecting human rights and basic freedoms. Membership is contingent upon this; and States which seriously violate this requirement may be suspended from representation on the Council and asked (or forced) to withdraw.

3. U.N. CHARTER, Preamble, arts. 55, 56, 68, 1, para. 3 & 62, para. 2.

ties proper to both the Council and the United Nations? How can European regionalism be reconciled with universalism in these matters?

At first the question presented very little difficulty. The Charter of the United Nations, adopted June 26, 1945, was fairly vague on the subject of human rights and so was the Statute of the Council of Europe, adopted May 5, 1949. The Universal Declaration of Human Rights of December 10, 1948,[4] was much more specific and its moral value and influence are not to be underestimated. Nevertheless, it had no binding force, at least according to prevailing opinion. Moreover, in order to secure the "universal and effective recognition and observance" of human rights, the Declaration itself envisaged "progressive measures, national and international," without excluding measures of a regional kind. Lastly, the preparation of the International Covenants on Human Rights[5] met with many obstacles; progress was so slow that one wondered whether the goal would ever be attained. Under these circumstances, there was nothing to restrain the Strasbourg organization from taking advantage of its greater cohesion by moving forward toward the realization of the protection of basic rights within Member States.

Despite some reluctance,[6] the Member States of the Council of Europe resolved to set up a regional protection of human rights. But in so doing they did not overlook article 1, paragraph (c), of the Statute. The Convention for the Protection of Human Rights and Fundamental Freedoms[7] (hereinafter the Convention), which opened for their signature on November 4, 1950, was—as stated in the Preamble—a series of "first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration." In sum, far from denying its origins, the Convention presented itself as the "eldest daughter" of the Universal Declaration.[8]

4. G. A. Res. 217 A (III), U.N. Doc. A/311 (1948).

5. *See* note 9 *infra.*

6. Modinos, *The Coexistence of the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights,* 1968 HUMAN RIGHTS J. 41; 1 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" (Council of Europe Doc. H. (61) 4 (confidential)) 8-9, 16-17 (1961) [hereinafter cited as TRAVAUX PRÉPARATOIRES]. *See also* EUR. CONSULT. ASS., MINUTES OF PROC. [hereinafter cited as MINUTES], 2d Sess., at 526-28 (Aug. 16, 1950) (remarks of Mr. Beaufort).

7. 213 U.N.T.S. 222 (1955). The Convention and Protocols are set out in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS ch. 1 (1971).

8. *See, e.g.,* Draft prepared by the European Movement, Doc. INF/5/E/R at 4-5 (1949); MINUTES, 1st Sess., at 410-12, 416-18, 434-36, 444 (Aug. 19, 1949) (remarks of Messrs. Lannung, Antonopoulos, Cingolani, Foster and Persico); MINUTES, 1st Sess.,

The situation has developed since then. On December 16, 1966, the General Assembly of the United Nations adopted an International Covenant on Economic, Social and Cultural Rights and a Covenant—accompanied by an Optional Protocol—on Civil and Political Rights.[9] At first sight, these instruments are less closely related to the Universal Declaration than to the European Convention. On their coming into force,[10] they will create real obligations; what is more, they will place these obligations under the supervision of international organs.

When the United Nations Covenants become effective will they not pointlessly duplicate, or even conflict with the European Convention? To avoid any such risk, three courses are open to the Member States of the Council of Europe: (1) abrogation of the European Convention; (2) refusal to sign or ratify the United Nations Covenants; or (3) pursuance of coexistence.

Neither of the first two solutions would stand up to close examination. To abandon the European achievements for the sake of a universalist ideal would be tantamount to dropping the substance for the shadow. In spite of incontestable merits, the Covenants suffer from an inherent weakness in the way they are to be implemented; for example, they do not provide for binding decisions comparable to those of the Committee of Ministers of the Council of Europe and the European Court of Human Rights (articles 32 and 53 of the Convention). Moreover, the Member States of the Council of Europe have a legitimate interest in settling *en famille* any disputes that may arise among them in the field of human rights: they benefit from a calmer atmosphere than the often high-tempered mood of the United Nations. Additionally, they enjoy the benefit of a European case law which has already helped to define—and even enrich—their "common spiritual heritage." Thus, there is little reason to abandon a regional system which has proved its worth.

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at 1158 (Sept. 7, 1949) (remarks of Mr. Teitgen); MINUTES, 1st Sess., at 1210-12, 1256 (Sept. 8, 1949) (remarks of Messrs. Serrarens and Teitgen); Committee on Legal and Admin. Questions, *Teitgen Report*, Eur. Consult. Ass., 1st Sess., Doc. No. 77, 1 Docs. 198-99 paras. 6 & 7, 204-05 arts. 1 & 2 (1949).

9. G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).

10. Thirty-five ratifications are needed for each of the Covenants and ten for the Optional Protocol. As of September 30, 1972 three Member States of the Council of Europe (Republic of Cyprus, Denmark and Sweden) have ratified the Covenants; the two last named have also ratified the Optional Protocol.

Conversely, it would be a serious mistake to disdain the Covenants through loyalty to the Convention. Such an attitude would not accord with article 1, paragraph (c), of the Statute, and world public opinion would not understand it. Further, on a few points, the Covenants are more progressive than the Convention. Their institutional inferiority is partly compensated for by a normative superiority in some respects, from which individuals within the jurisdiction of the Member States of the Council of Europe should profit. Ratification of the Covenants, moreover, would offer these States a considerable advantage by enabling them to exert a positive influence on the interpretation and application of the universal instruments.

The two extreme solutions having been disposed of, a middle path—the coexistence of the Convention and the Covenants—remains to be explored. This approach is evidently not without its difficulties as the European Ministers of Justice had occasion to realize at their Fifth Conference held in London on June 5-7, 1968. In the light of a report concerning "the relations between the European Convention . . . and the United Nations Covenant on Civil and Political Rights" presented by Mr. P. Modinos, the then Deputy Secretary General of the Council of Europe, they recommended to the Committee of Ministers "that measures should be taken with a view to ensuring, in respect of States which are Parties to both instruments, the harmonious functioning of these two systems for the international protection of Human Rights."[11]

The Committee of Ministers had not awaited this invitation to act: as early as 1967, they had instructed the Committee of Experts on Human Rights to study the problems arising from the coexistence of the Convention and the Covenants. The experts completed their task in 1969. On the basis of their conclusions, the Committee of Ministers adopted, in 1970, a number of decisions which will be mentioned below insofar as they have been made public.[12]

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11. Res. 2, 5th Conference of the European Ministers of Justice (1968). *See also* Council of Europe Doc. CMJ (68) 9 (rev. 1968); Council of Europe Doc. CMJ (68) CR at 56-90 (1968) (final); Modinos, *supra* note 6.

12. Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 21-23, 53-54, 4 Docs. (1970-71). *See also* Eur. Consult. Ass., 18th Sess., Doc. No. 2069 at 12, 2 Docs. (1966); Eur. Consult. Ass., 19th Sess., Doc. No. 2228 at 9, 2 Docs. (1967) and Doc. No. 2329 at 6, 9 Docs. (1967-68); Eur. Consult. Ass., 20th Sess., Doc. No. 2359 at 58, 1 Docs. (1968), Doc. No. 2453 at 5-6, 8 Docs. (1968), Doc. No. 2489, 10 Docs. (1968-69), Doc. No. 2505 at 2, 3, 9, 11, 12 Docs. (1968-69), Doc. No. 2527, 15 Docs. (1968-69); Eur. Consult. Ass., 21st Sess., Doc. No. 2623 at 10-11, 6 Docs. (1969-70); Eur. Consult. Ass., 23d Sess., Doc. No. 2962 at 11-16, 3 Docs. (1971-72); Eur. Consult. Ass., 23d

Both the Committee of Experts and the Committee of Ministers considered separately:

I. the *procedural* aspect of the matter, in other words "the problems arising from the coexistence of the two systems of control provided for by the European Convention and the U.N. Covenant on Civil and Political Rights"[13]; and

II. the *normative* aspect, concerning "the problems arising from the differences in the definition of the rights guaranteed in the two instruments."[14]

This article examines these aspects of the coexistence in parts I and II. In Part III, we shall endeavor to show the relationship between the procedural and the normative. As in the Committee of Experts study, the Covenant on Economic, Social and Cultural Rights will scarcely be mentioned since it is mostly in connection with the European Social Charter of October 18, 1961 that its entry into force may give rise to problems of "coexistence."[15]

I. The Procedural Aspect

With regard to the procedural aspect, a distinction must be drawn between (A) applications or communications by States and (B) applications or communications by private persons ("individuals"). For each of these two categories we shall try to review the relevant texts, problems and solutions. In part (C), the possible "duplication" of a State application and an individual communication will be examined.

A. *Applications and Communications by States*

1. *The texts.*

According to article 24 of the Convention, "any High Contracting Party may refer to the [European] Commission [of Human Rights], through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party."

Sess., Doc. No. 3067 at 1-3, 13 Docs. (1971-72); Eur. Consult. Ass., 20th Sess. (3d Part), Texts Adopted, Recommendation 548, para. 7(I)(a) (Jan. 1969); Eur. Consult. Ass., 23d Sess. (2d Part), Texts Adopted, Recommendations 642 paras. 3-5 (Oct. 1971); 10 Eur. Conv. on Human Rights Y.B. 106-08 (1967) [hereinafter cited as Y.B.]; 11 Y.B. 98-102 (1968); 12 Y.B. 132-34 (1969).

13. 11 Y.B. 102 (1968).

14. *Id.*

15. The examination of this matter has been placed on Council of Europe's intergovernmental work program for 1971-72 (item 424/2). *See also* Eur. Consult. Ass., 23d Sess., Doc. No. 2962 at 16-17, 3 Docs. (1971-72).

The Covenant on Civil and Political Rights ("the Covenant") does not go so far. Under the terms of its article 40:

> "the States Parties . . . undertake to submit reports on the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights, [indicating] the factors and difficulties, if any, affecting the implementation of the . . . Covenant."

The Human Rights Committee provided for in article 28 of the Covenant (the New York Committee)[16] "shall study" these reports. It "shall transmit its [own] reports, and such general comments as it may consider appropriate, to the States Parties," and will be entitled to "transmit to the Economic and Social Council these comments along with copies of the reports it [will have] received from States Parties to the . . . Covenant."

Taken alone, such a reporting system can be easily reconciled with the operation of article 24 of the Convention. However, the Covenant adds in the first sentence of paragraph 1 of article 41, that "A State Party . . . may at any time declare . . . that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the . . . Covenant."

This competence will be exercised only on condition of reciprocity and after its acceptance by ten States.[17] In spite of its optional nature, it is similar to the jurisdiction conferred by article 24 of the Convention on the Strasbourg Commission: in both cases, a State alleges the violation of a treaty[18]; in both cases interest need not be shown and the nationality of the "victim" is of no consequence.

The procedure applicable in the matter also recalls that laid down in the Convention. The New York Committee, which will sit in camera, will have to satisfy itself that the domestic remedies have been exhausted, and offer its "good offices . . . with a view to a friendly solution . . . on the basis of respect for human rights and fundamental free-

16. The Committee will "normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva." Covenant, art. 37, para. 3.

17. Covenant, art. 41, paras. 1, 2. As of September 30, 1972, two Member States of the Council of Europe (Denmark and Sweden) have made such a declaration.

18. In a sense, article 41 of the Covenant is even clearer in this respect ("a State Party claims that another State Party is not fulfilling its obligations") than the French text of article 24 of the Convention ("qu'elle croira pouvoir être imputé"; in English, "any alleged breach"). Notwithstanding their name, "communications" will therefore be real applications.

doms."[19] It will be empowered to request "any relevant information" from the "States Parties concerned" who will have "the right to make submissions orally and/or in writing."[20] Finally, its proceedings will result in the drafting of a report which will be "communicated to the States Parties concerned."[21] The report will be confined, depending whether the attempt at a friendly settlement succeeds or fails, "to a brief statement of the facts and of the solution reached"[22] or "to a brief statement of the facts."[23] On the latter point, the New York Committee's functions will be much more narrow than those of the Strasbourg Commission: they will not include the expression of an opinion on the existence or absence of a violation.[24] Moreover, the Covenant does not provide for any judicial or quasi-judicial ruling by an organ comparable to the European Court of Human Rights and to the Committee of Ministers of the Council of Europe.[25]

If the European States ratify the Covenant and, in addition, accept the competence of the New York Committee to deal with State communications, will there be a risk of pointless duplication, or even of conflict, between article 41 of the Covenant and article 24 of the Convention? To answer this, account must be taken of article 44 of the Covenant and article 62 of the Convention:

Article 44 of the Covenant

> The provisions for the implementation of the . . . Covenant . . . shall not prevent the States Parties . . . from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.[26]

Article 62 of the Convention

> The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting,

19. *Compare* Covenant, art. 41, para. 1 (*d*), (*c*), (*e*) *with* Convention, arts. 33, 26 & 28, para. *b*. *See also* Covenant, art. 42 (ad hoc Conciliation Commissions).

20. *Compare* Covenant, art. 41, para. 1 (*f*), (*g*) *with* Convention, art. 28, para. *a*.

21. Covenant, art. 41, para. 1 (*h*).

22. *Compare* Covenant, art. 41, para. 1 (*h*) (i) *with* Convention, art. 30.

23. Covenant, art. 41, para. 1 (*h*) (ii).

24. *See* Convention, art. 31.

25. Convention, § IV & art. 32. According to article 45 of the Covenant, the New York Committee "shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities." *See also* Covenant, art. 46.

26. Reference of a case to the International Court of Justice, for example.

> by way of petition, a dispute arising out of the interpretation or application of [the] Convention to a means of settlement other than those provided for in this Convention.

2. *The problems.*

Do the articles quoted above rule out a free choice between the "European" and the "universal" procedures or, if not, the duplication of the latter and the former?

(a) Possibility of free choice between the two procedures

Article 62 of the Convention would not forbid European States from bringing a matter before the New York Committee rather than the Strasbourg Commission. Admittedly, it does not apply only to "treaties, conventions or declarations" in force at the time the Convention took effect. The opposite interpretation, which would exclude the Covenant outright[27] but create complications,[28] is not dictated by the text, since "in force" (French: *existant*) may very well be taken to mean "in force at any time." Moreover, it would scarcely be in keeping with the indications to be found in the *travaux préparatoires,* throughout which the autonomy and regional character of the Convention were constantly asserted with ever-increasing emphasis.[29]

Despite this, article 62 concerns only "disputes arising out of the interpretation or application" of the Convention, whereas a case referred to the New York Committee would relate to the Covenant even if the provisions invoked were identical to a clause of the Convention.

Conversely, article 44 of the Covenant would leave States Parties to the Convention free to lodge an application at Strasbourg rather than New York; for the Convention is without doubt included among the "special international agreements" mentioned.[30]

(b) Possibility of duplication of proceedings

Again, neither article 62 of the Convention nor article 44 of the Covenant prohibits use by the States of the two procedures, whether

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27. Except for States ratifying the Convention simultaneously with the Covenant or later.

28. The dates of entry into force vary according to the instruments (Convention, Protocol No. 1 and Protocol No. 4) and to the States.

29. Council of Europe Doc. CDH (69) 12 (1969) (confidential) which contains preparatory work on Convention, art. 62. *See also* J. DE MEYER, LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME ET LE PACTE INTERNATIONAL RELATIF AUX DROITS CIVILS ET POLITIQUES 20-21, 92-93 (1969). *Compare with* the discussion of article 60 of the Convention at p. 210 *infra.*

30. Note that article 44 of the Covenant differs from article 62 of the Convention in that the former uses terms which are both broad ("a dispute," even relating to the Covenant) and permissive ("shall not prevent").

simultaneously or not. Furthermore, article 27, paragraph 1 (b), of the Convention refers only to individual applications; it is hardly likely that the Commission would apply it by analogy to applications from States.[31] As to the Covenant, it contains no rule similar to that laid down in article 5, paragraph 2 (a), of its Optional Protocol,[32] which deals exclusively with individual communications. Whether still pending or not, proceedings instituted pursuant to article 24 of the Convention would therefore be no obstacle to the filing in New York of a communication by (1) the State which had referred the same matter to the European Commission, by (2) another State Party to the Convention, or by (3) a third State.

3. *The solutions.*

The European States would be wrong to be content with the situation which would result from the texts, analyzed above. Firstly, duplication of proceedings would lead to shocking consequences. Differences in assessment would almost inevitably occur between the New York Committee and the Strasbourg bodies. Furthermore, the former would in practice be given a right to look into, if not to censure, the activities of the latter, who would in turn enjoy the same right. For instance, a State resorting to the New York Committee after having vainly lodged an application under the Convention would appear to be making a kind of appeal: it would in effect be asking the Committee to uphold a claim which the Commission, Court or Committee of Ministers had declared inadmissible or ill-founded. This would undermine the authority of institutions empowered by the Convention to make binding and final decisions in their respective domains.[33]

It has been maintained that a proper approach to the problem of duplication requires going beyond the "formal" distinctions between obligatory sanctions and noncompulsory measures: according to some authors, the "views" of the universal body might constitute as effective a means of persuasion as regional decisions, provided they receive a minimum of publicity.[34] That this opinion corresponds to a very "real-

31. The relevant text of this paragraph is quoted at p. 196 *infra*. *See also* note 59 *infra*.

32. *Id.*

33. Convention, arts. 27, 49, 50, 52, 53 & 32, para. 4. *See also* note 70 *infra* and the first paragraph of section I (B) (2) (b) (i) *infra*.

34. *E.g.*, Tardu, *Quelques questions relatives à la coexistence des procédures universelles et régionales de plainte individuelle dans le domaine des Droits de l'Homme*, 1971 HUMAN RIGHTS J. 589, 622 (1971) (referring to Vasak).

istic conception of international life" seems rather doubtful. Of course, a mere recommendation carries the same weight as an enforceable decision on occasion: a totalitarian State is inclined to attach as little importance to the latter as to the former; strong political, economic or military pressure on the part of Great Powers sometimes transforms a recommendation into a de facto order, etc. Leaving aside these and other equally extreme examples, we do believe that the possibility of a legal decision—even if not used in a concrete case—is essential for genuine international protection of human rights. Whatever its value, publicity cannot suffice. The European system takes it into account, but mainly for the more determinative phases of the procedure,[35] a fact which is not without significance.

As to full freedom of choice between the two procedures, it would be scarcely reconcilable with the spirit of the Convention and of the Council of Europe's Statute. The Council aims at "the achievement of greater unity between its Members," particularly by "the maintenance and further realization of human rights."[36] Together its Members form a fairly homogeneous family within which problems concerning human rights have a good chance of being resolved in a less political atmosphere than at the United Nations. Unless they surrendered their option to settle their disputes *inter se* at world-wide level, would they not run the risk of impairing their privileged relationship? The European idea would suffer thereby, and the cause of human rights would probably fail to gain anything since the implementation system under the Convention is superior to that provided for in the Covenant.

Moreover, article 33 of the San Francisco Charter encourages the regional settlement of interstate disputes. Although it mentions only disputes "the continuance of which is likely to endanger the maintenance of international peace and security," it would appear to apply a fortiori to those involving no such danger since the fight for international peace and security figures among the fundamental tasks of the United Nations.[37]

In any event, the sole way of avoiding duplication of interstate proceedings would seem to be the establishment of a "Europe prefer-

35. Convention, art. 32, para. 4; Rules of Court of the European Court of Human Rights 18, 51, 52 [hereinafter cited as Court Rules], in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS ch. 3 (1971).

36. *Compare* the Convention Preamble and STATUTE OF THE COUNCIL OF EUROPE, art. 1 *with* U.N. CHARTER, art. 1.

37. U.N. CHARTER, art. 1, para. 1.

ence" abolishing or reducing the governments' freedom of choice. Admittedly, the European States would debar the New York Committee from dealing with a matter already examined or pending in Strasbourg if they made an appropriate reservation with their declarations under article 41 of the Covenant,[38] but this reservation would operate exclusively in the case of "Strasbourg followed by New York." As to the Convention, we know it admits of duplication, particularly in the case of "New York followed by Strasbourg"; furthermore, it does not authorize the Contracting States to limit a posteriori the jurisdiction defined in its article 24.[39]

De lege ferenda, various means are conceivable to create the "European preference" which appears to be needed. First of all, a resolution of the Committee of Ministers of the Council of Europe could invite the Member States to have recourse, as between themselves, only to the "European" procedure with regard to the rights written into the Convention as well as into existing and future Protocols. In other words, they would be asked not to exercise their freedom of choice, and this alone would tend to eliminate any duplication of proceedings in their mutual relations.[40] Whether couched in the form of a recommendation[41] or not, a resolution of this kind would not place Member States under any legal obligation but merely advocate a common policy or, at most, unofficially record a "gentlemen's agreement."

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38. *See mutatis mutandis* section I (B)(3) *infra,* as from third paragraph; Modinos, *supra* note 6, at 67-68.

39. According to article 64 of the Convention, a reservation has to be made when signing, or depositing the instrument of ratification, and must relate to a law not in conformity with a provision of the Convention. How could these conditions be fulfilled in the instant case? Similarly, a reservation to article 24 would not satisfy the requirements of general international law by reason, if nothing else, of its belatedness, unless it came from a State ratifying the Convention either for the first time (for example, France or Switzerland) or after having denounced it. *Cf.* Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, art. 19 (1969). Even then, it would have to be ascertained whether the special rules of article 64 of the Convention do not exclude the application of general international law on reservations. *Cf.* article 19, paragraph b of the Vienna Convention on the Law of Treaties. *See also* Khol, *Fragen der Systeme internationaler Verfahren zum Schutz der Menschenrechte und ihrer Konkurrenz,* in DEUTSCHLAND, EUROPA UND DIE MENSCHENRECHTE 190 (1968).

40. States not parties to the Convention would, of course, not be affected. They would therefore be entitled to refer to the New York Committee a matter which a Contracting State or a private person had brought before the Strasbourg Commission. This would result in a rather unfortunate "relative duplication" which could hardly be avoided by legal provisions.

41. Adopted unanimously, as required by article 20 of the Statute of the Council of Europe. It has been suggested that a tacit agreement would suffice. Marcus-Helmons, *Protection universelle ou régionale des Droits de l'Homme?,* 1968 REVUE GÉNÉRALE BELGE 97.

An international treaty, identical in content to the said resolution, would undoubtedly offer much stronger guarantees because the "European preference" would rest upon precise commitments and not simply on wishes. If necessary, it could be concluded between a limited number of Member States since—unlike the Third and Fifth Protocols —it would not amend the Convention.[42]

One could also think of a network of reservations by which the European States would remove from the competence conferred on the New York Committee by article 41 of the Covenant the examination of any complaint lodged by one against another, unless it concerned rights which the Convention and its Protocols do not protect. Having regard to article 44 of the Covenant and article 33 of the San Francisco Charter, such reservations would not be "incompatible with the object and purpose" of the Covenant. However, in the absence of the treaty suggested above, they would have a rather precarious efficacy in law: being the expression of the unilateral will of States, they could be withdrawn by them; if they were made in addition to this treaty, they would probably prove superfluous.

The entry into force of an international treaty would take time, and in the interim, reservations, or a resolution by the Committee of Ministers would have a certain usefulness which would not subsequently be completely lost if some European States refused to subscribe to a multilateral agreement.

Whatever its legal form, should the "European preference" go as far as "exclusivity"? Should it apply to every interstate dispute capable of being validly referred to the Strasbourg Commission, or only as a rule? Should the European States remain free to petition the New York Committee in exceptional circumstances, even *inter se* and in respect of rights listed in the Convention and Protocols? In short, should they maintain an escape clause? In the present instance, one would wish strictness to prevail over flexibility.

4. *Decision of the Committee of Ministers.*

The Committee of Ministers of the Council of Europe chose the

42. *Cf.* Eissen, *Les mesures provisoires dans la Convention européenne des Droits de l'Homme,* 1969 HUMAN RIGHTS J. 256-57. In addition to reservations to article 41 of the Covenant, Khol favors a revision of article 62 of the Convention. Khol, *supra* note 39, at 191. One must remember, however, that Protocols Nos. 3 and 5, modifying five articles of the Convention, came into effect only a few years after they were opened to the signature of Member States (the respective signature-effective dates being May 6, 1963 and Sept. 21, 1970 for Protocol No. 3 and Jan. 20, 1966 and Dec. 20, 1971 for Protocol No. 5). Thus a less burdensome procedure appears preferable.

first of the solutions studied above. On May 15, 1970, the Ministers' Deputies adopted Resolution (70) 17 reproduced below:

U.N. Covenant on Civil and Political Rights and the European Convention on Human Rights: Procedure for dealing with inter-state complaints

The Committee of Ministers,

Considering that, on 16 December 1966, the General Assembly of the United Nations, by its Resolution 2200(XXI), adopted the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights;

Considering that the Covenant on Civil and Political Rights sets out in its Article 41 an optional procedure under which a State Party may bring to the attention of the U.N. Human Rights Committee a claim that another State Party is not fulfilling its obligations under the Covenant;

Considering that Article 24 of the European Convention on Human Rights has already established a procedure whereby a Contracting Party may refer to the European Commission of Human Rights any alleged breach of the provisions of that Convention by another Contracting Party;

Considering that there are a certain number of rights which in substance are covered both by the U.N. Covenant and by the European Convention;

Considering that the procedure instituted by the European Convention provides an effective system for the protection of human rights, including binding decisions by the Court of Human Rights or by the Committee of Ministers;

Recognising the value of the procedure established by the U.N. Covenant for the protection of rights not included in the European Convention and its Protocols;

Considering that Article 44 of the U.N. Covenant provides that its provisions shall not prevent States Parties from having recourse to other methods of settlement of disputes, and that under Article 62 of the European Convention the Contracting Parties agree that they will not, except by special agreement, submit a dispute arising out of the interpretation or application of the Convention to a means of settlement other than those provided for in the Convention;

Considering, however, that differences of opinion appear to exist as regards the exact scope of the obligation resulting from Article 62;

Considering that Article 33 of the Charter of the United Nations emphasizes the importance of regional settlement of interstate disputes,

Declares that, as long as the problem of interpretation of Article 62

> of the European Convention is not resolved, States Parties to the Convention which ratify or accede to the U.N. Covenant on Civil and Political Rights and make a declaration under Article 41 of the Covenant should normally utilise only the procedure established by the European Convention in respect of complaints against another Contracting Party to the European Convention (or its Protocols) and by the U.N. Covenant on Civil and Political Rights, it being understood that the U.N. procedure may be invoked in relation to rights not guaranteed in the European Convention (or its Protocols) or in relation to States which are not Parties to the European Convention.

As between Governments, the above resolution aims not only at preventing the duplication of the "European" and of the "universal" procedures, but also at establishing a system or practice of "preference" for the former. The use of the adverb "normally" in the last paragraph, however, seems to imply that this preference will not go as far as exclusivity. In addition, the Committee apparently does not contemplate the conclusion of an international agreement creating legal obligations; it confines itself, at least for the present, to advocating a common policy. Resolution (70) 17 has not even the character of a recommendation. On the other hand, it is framed in broad enough terms to cover future Protocols, if any, in addition to the Convention and the existing Protocols.

B. *Applications and Communications by Private Persons*

1. *The texts.*

According to article 25, paragraph 1, of the Convention:

> the Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, [provided that the respondent State] has declared that it recognises the competence of the Commission to receive such petitions.

As to the Covenant, it is supplemented by an Optional Protocol of which article 1 is worded as follows:

> A State Party to the Covenant that becomes a party to the present Protocol recognises the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant....

"Subject to the entry into force of the Covenant, [the Optional Protocol] shall enter into force three months after the date of the deposit . . . of the tenth instrument of ratification or instrument of accession."[43] The competence it will confer on the New York Committee resembles that bestowed by article 25 of the Convention on the Strasbourg Commission: in both cases, a private person complains of a wrong which he claims to have suffered. Similarities are also to be noticed with regard to the procedure applicable. The New York Committee, which will sit in camera, will have such functions as: verifying the exhaustion of "all available domestic remedies,"[44] dismissing any communication which is anonymous, abusive or incompatible with the provisions of the Covenant,[45] receiving "written explanations or statements" from the respondent government and "written information made available" by the latter and by the individual applicant,[46] etc.

The Optional Protocol, however, proves more discreet than the Convention—and even the Covenant[47]—in respect to the outcome of the case. It does not expressly mention the attempt to reach a friendly settlement,[48] nor specify the nature of the "views" (French: *constatations*) which the Committee "shall forward . . . to the State Party concerned and to the individual."[49] What is more, it provides for no judicial or quasi judicial ruling by an organ comparable to the European

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43. Optional Protocol to the International Covenant on Civil and Political Rights, art. 9, para. 1, Res. 2200, 21 U.N. GAOR Supp. 16, at 59, U.N. Doc. A/6316 (1966) [hereinafter cited as Optional Protocol]. *See supra* note 10. *Compare* Optional Protocol, art. 9, para. 1 *with* Convention, art. 25, para. 4, the requirements of which (six acceptances) were met on July 5, 1955. Out of fifteen Parties to the Convention, eleven are presently bound by declarations pursuant to paragraph 1 of article 25.

44. *Compare* Optional Protocol, arts. 2 and 5, paras. 2*b*, 3 *with* Convention, arts. 26, 33, & 27, para. 3.

45. *Compare* Optional Protocol, art. 3 *with* Convention, art. 27, paras. 1*a*, 2. It should be noted in passing that the Optional Protocol, unlike articles 26 & 27, paragraph 2, of the Convention, does not include "manifest ill-foundedness" and "belatedness" in its list of grounds of inadmissibility.

46. *Compare* Optional Protocol, arts. 4 and 5, para. 1 *with* Convention, art. 28, para. *a*. The Optional Protocol differs from the Convention, the Strasbourg Commission's Rules of Procedure and article 41, paragraph 1*g* of the Covenant, in that the Protocol does not seem to envisage oral hearings.

47. *See* text at section I (A) (1) *infra*.

48. *Compare with* Convention, arts. 30, 47 and 28, para. *b*. On the other hand, according to article 4, paragraph 2, of the Optional Protocol, the respondent State shall "submit to the Committee . . . the remedy, if any, that may have been taken by that State." *See also* Tardu, *supra* note 34, at 596-97 (about article 5, paragraph 4).

49. *Compare* Optional Protocol, art. 5, para. 4, *with* Convention, arts. 30, 31. On this topic, see the interesting observations of Tardu, *supra* note 34, at 597.

Court of Human Rights and to the Committee of Ministers of the Council of Europe.[50]

Will there be a risk of pointless duplication, or even of conflict, between the Optional Protocol—if the European States ratify it—and article 25 of the Convention? To answer this, account must be taken of article 5, paragraph 2(a), of the Optional Protocol and article 27, paragraph 1(b), of the Convention.

Article 5, paragraph 2(a), of the Optional Protocol

> The Committee shall not consider any communication from an individual unless it has ascertained that:
>
> (a) the same matter is not being examined under another procedure of international investigation or settlement;

Article 27, paragraph 1(b), of the Convention

> The Commission shall not deal with any petition submitted under Article 25 which
>
> ....
>
> (b) is substantially the same as a matter which has . . . already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

2. *The problems.*

(a) Possibility of free choice between the two procedures.

If a State were to recognize the right of individual petition both at "world" and at "European" levels, persons subject to its jurisdiction would enjoy complete freedom of choice between the two procedures. This emerges, at least implicitly, from the texts quoted in the preceding paragraph. Furthermore, article 62 of the Convention does not govern individual applications or communications.[51]

(b) Possibility of duplication of proceedings.

(i) "New York followed by Strasbourg."

The hypothesis of a communication to the New York Committee

50. Convention, §IV & art. 32. Article 6 of the Optional Protocol prescribes that "the Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the . . . Protocol." *See also supra* note 25; Tardu, *supra* note 34, at 597-98.

51. *See* Convention, art. 62 ("the High Contracting Parties," "avail themselves," "between them"); Council of Europe Doc. CDH (69) 12 at 31 (1969) (confidential). This opinion is shared by Tardu, *supra* note 34, at 599.

being followed by an application to the Strasbourg Commission has been described as "probably theoretical to a large extent" since, according to article 26 of the Convention, reference to the latter body must occur "within a period of six months from the date on which the final [domestic] decision was taken."[52] This opinion is not quite convincing: an individual might well seize the European Commission after the New York Committee but still before the expiration of the said time limit. This might occur, for example, if he did not await the outcome of the United Nations proceedings or if his communication had been dismissed because he had not yet exhausted domestic remedies.[53] This being so, would an individual communication addressed to the New York Committee constitute a "matter" (French: *requête*) and would it initiate a "procedure of international investigation or settlement," for the purposes of article 27, paragraph 1 (b), of the Convention? Should an individual application to the Strasbourg Commission be considered, in certain circumstances, "substantially the same" as such a communication—although based on the Convention and not on the Covenant?

Each of these three questions calls for an affirmative reply. First of all, communications lodged by virtue of the Optional Protocol would come from individuals claiming to be the victims of a violation of a right, and they would set in motion proceedings involving the hearing of both parties[54]; they would thus be real *requêtes,* and a fortiori "matters," within the meaning of the French and English texts of article 27, paragraph 1 (b), of the Convention. Secondly, the New York Committee would apparently have powers of investigation if not of settlement, despite the fact that its functions would be less extensive for individual than for State communications.[55] Finally, paragraph 1 (b) of article 27 would serve little useful purpose if it related only to matters concerning the interpretation or application of the Convention.[56] This is true because the Strasbourg Commission is the sole

52. Tardu, *supra* note 34, at 599.

53. Incidentally, one must question whether an application to the Strasbourg Commission could be "substantially the same" as a previous communication rejected by the New York Committee for the mere reason of a procedural defect *capable of being cured,* as in the last mentioned case.

54. Yet this *caractère contradictoire* is perhaps less marked than in the Convention. *Compare* Optional Protocol, arts. 4, para. 2 and 5, para. 1 *with* Convention, art. 28, para. *a. See also supra* note 18; section I (B) (1) *supra.*

55. *See* sections I (A) (1) and I (B) (1) *supra;* Tardu, *supra* note 34, at 601.

56. *See* section I (A) (2) (a) *supra* discussing article 62 of the Convention.

international organ of investigation or settlement before which private persons may invoke the Convention.

Article 27, paragraph 1 (b), therefore, precludes duplication of proceedings involving recourse to Strasbourg after New York[57]; it thereby sanctions in its field, as it were, the maxim: "He who has chosen one way cannot have recourse to another."[58] It makes no distinction according to whether the other "procedure of international investigation or settlement" is still pending or has been completed: the phrase "which . . . has already been submitted" does not lend itself to such a distinction.[59]

To be "substantially the same" as an individual communication to the New York Committee, should an application made pursuant to article 25 of the Convention not only relate to the same facts and allege violation of the same right, but also be filed by the same person? In other words, is the objective criterion of identity of cause and object sufficient in this respect, or must it be combined with the subjective criterion of identity of parties?[60] While the term "matter" in the English text of article 27, paragraph 1 (b), may be taken to support the former solution, the French version (*requête*) and general principles governing litispendentia and res judicata plead rather for the latter which, in addition, probably better accords with the spirit of the Con-

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57. Tardu questions—without reaching firm conclusions—whether such duplication is not equally forbidden by the Optional Protocol and article 44 of the Covenant. Tardu, *supra* note 34, at 599-600.

58. *"Electa una via, non datur recursus ad alteram."* 10 Toullier, Dr. Civ. Fr., no. 170 (1837). *But see* note 75 *infra.*

59. This opinion is shared by De Meyer and—with some hesitation—by Tardu. J. De Meyer, *supra* note 29, at 95. Tardu, *supra* note 34, at 601-02. The American Convention on Human Rights is even clearer in this respect. Once in force, it would oblige the Inter-American Commission to declare inadmissible any petition or communication, whether from a State or a private person, the subject of which was "pending before another international procedure for settlement" or which was "substantially the same as one previously studied by the Commission or another international organization." American Convention on Human Rights, arts. 46, para. 1(c) and 47, para. (d), O.A.S. Official Records, OEA/Ser. K/XVI/1.1, Doc. 65 (1970).

60. *See also supra* note 53. In his recent article, Tardu wonders whether the Strasbourg Commission ought to decline jurisdiction whenever an individual application contained information which another international body of investigation or settlement (for example the U.N.-I.L.O. Special Committee on Forced Labor) was taking or had taken just as an aspect of a broader problem or as mere evidence of a general situation. Tardu, *supra* note 34, at 611-13. This question falls outside the scope of this paper since it does not appear to concern the Covenant and Optional Protocol; but it deserves negative reply—a conclusion which Tardu himself reaches. *Id.* at 621. It seems obvious that such an application could not be considered "substantially the same" as a *requête,* and even as a matter, already submitted to another international procedure.

vention.[61] No doubt the Strasbourg Commission will eventually be called upon to pronounce on the point.[62]

(ii) "Strasbourg followed by New York."

On the other hand, duplication of proceedings in the case of "Strasbourg followed by New York" would clash with no provision of the Convention.[63] Nor would it be prohibited in clear terms by article 5, paragraph 2 (a), of the Optional Protocol. Of course, resort to the European Commission does initiate "another procedure of international investigation or settlement" and a study of the *"travaux préparatoires"* would confirm, if necessary, that individual applications addressed to this organ have not been overlooked. Taken literally, however, article 5, paragraph 2 (a), would operate only in case of litispendentia. True, it may be hoped that the New York Committee would give that provision a broad interpretation resting on a reasoning by analogy or a fortiori, but a wish affords little legal certainty. It is safer to begin from the hypothesis that the ground of inadmissibility set out in article 5, paragraph 2 (a), would have a delaying and not definitive effect.[64] Even litispendentia would perhaps not prevent the New York Committee from dealing with an individual communication whenever it found that the other proceedings of international investigation or settlement—for example, at Strasbourg—were "unreasonably prolonged": such view has been put forward in the light of

61. Adopting a purely objective criterion would allow a State to instigate reference of a case to the New York Committee by individual *A*, and then use this as an argument in order to obtain the dismissal of the "European" application lodged by individual *B*. The more effective action of the Strasbourg organs would thus be paralyzed.

62. On August 28, 1959, the European Commission of Human Rights declared Application 499/59 to be "substantially the same" as Application 397/58, which had already been examined by it—not "already . . . submitted to another procedure of international investigation or settlement"—even though the parties were not identical. It should be noted, however, that the second applicant was the mother of the applicant in the earlier action. App. No. 499/59, 2 Y.B. 397-400 (1959). More recently, the Commission applied article 27, paragraph 1*b* of the Convention, in spite of the fact that the parties were not altogether identical. The second application (App. No. 3413/67, unpublished decision of Dec. 16, 1968) had been lodged by both the author of the first application (App. No. 2369/64, 23 COLL. OF DECISIONS OF THE EUR. COMM'N OF HUMAN RIGHTS 21-25 (1964)) and a company of which this applicant was a major shareholder. These are isolated decisions. The Commission does not usually base itself on article 27, paragraph 1 when rejecting an application which relates to the same matter as a previous complaint, brought by a different individual, which has been judged inadmissible or ill-founded by the Commission, Court or Committee of Ministers. *See, e.g.*, App. No. 2333/64, 11 Y.B. 264/68 (1968); App. No. 2518/65, 8 Y.B. 374 (1965); App. No. 1135/61, 6 Y.B. 202 (1963); App. No. 924/60, 6 Y.B. 168-70 (1963); App. No. 493/59, 4 Y.B. 312-14 (1961). *See also* Khol, *supra* note 39, at 184.

63. *But see* the doubts expressed by Tardu, *supra* note 34, at 606-07.

64. *Compare with* text accompanying notes 57-59 *supra*.

the "*travaux préparatoires*" and of the English text of article 5, paragraph 2 (a).[65]

Moreover, might not the coexistence of the Optional Protocol with article 25 of the Convention lead to positive or negative conflicts of jurisdiction? Suppose, for example, that at a given time the same matter was pending before both the New York Committee and the Strasbourg Commission. Would not competence be declined by the former under article 5, paragraph 2 (a), of the Optional Protocol, and equally by the latter pursuant to article 27, paragraph 1 (b), of the Convention? To avoid such an unfortunate result, would the date of sending (or receipt) of the communication be compared with that of the application? What would happen if the dates coincided? One author considers this hypothesis "rather theoretical": according to him, the Strasbourg Commission ought to dismiss the application under article 27, paragraph 1 (b), of the Convention so that the "matter" no longer "being examined" elsewhere within the meaning of article 5, paragraph 2 (a), of the Optional Protocol, could thenceforth be dealt with by the New York Committee.[66] His opinion, we submit, rests on a questionable—although not implausible—prognosis of the way in which the two bodies would carry out their duties. The individual communication and application might well both be rejected because the New York Committee and the Strasbourg Commission had not waited for, or did not know of, one another's decision. Assuming the Strasbourg Commission learned of the New York ruling in time, should it nevertheless hold that the matter had "already been submitted to another procedure" etc. and, if so, that the said ruling was no "relevant new information" for the purposes of article 27, paragraph 1 (b), of the Convention? Presumably not[67]; but if it did, there would be a negative conflict of jurisdiction.

Alternatively, if rejection by the New York Committee under article 5, paragraph 2 (a), of the Optional Protocol was brought to the

65. Tardu, *supra* note 34, at 604-05. From the information supplied by the treaty division of the legal services of the United Nations Secretariat it is clear, however, that at least in the English original of the Protocol the sentence "This shall not be the rule where the application of the remedies is unreasonably prolonged" is part of subparagraph (b) of article 5, paragraph 2, and does not refer to subparagraph (a). Furthermore, the provision was adopted on the basis of an English draft of these lines. Tardu evidently relied on a misleading copy of the English text (perhaps document A/CONF. 32/4, at page 17) in which the sentence was presented so as to create a possibility of ambiguity.

66. *Id.* at 611.

67. *See mutatis mutandis* note 53 *supra.*

attention of the Strasbourg Commission after the latter's finding of inadmissibility based on article 27, paragraph 1 (b), of the Convention, could a fresh application validly invoke it as "relevant new information"? This would eliminate the negative conflict ex post and we are inclined to favor a reply in the affirmative. However, this reply is not self evident.

It might also happen that the Strasbourg Commission would defer its decision pending that of the New York Committee, and vice versa. This would result in a "latent" positive conflict.[68]

Finally, how are the words "the same matter" (French: *la même question*) to be understood? For two "matters," raised respectively in an individual communication and in an application "being examined" at Strasbourg, to be "the same" in the view of the New York Committee, would identity of parties be one of the prerequisites?

3. *The solutions.*

To form an opinion of the situation which would result from the texts analyzed above, we should consider first whether it would be wise to grant full freedom of choice between the two procedures. By addressing themselves to the New York Committee, individuals would run the risk of prejudicing their own cause as the cases they submitted on the world scene might have had a better chance of being settled to their satisfaction before the Strasbourg organs. The respondent States would lose the advantage of the calm atmosphere in which proceedings instituted at European level usually take place. In any event, the ideal way to escape duplication of international remedies, together with the ensuing problems and difficulties, would obviously be either not to ratify the Optional Protocol at all, or to accept it only with regard to communications relating to rights which the Convention and the Protocols thereto do not guarantee.

Yet a negative or very restrictive attitude on the part of the European States would hardly accord with their democratic principles, would blatantly contradict the generous standpoint adopted by many of them at the United Nations, would render ratification of the Covenant almost without effect, and would be badly received outside. Moreover, it would be the victim of an alleged violation who would suffer the

68. As to positive conflicts due to lack of information, see notes 73-75 *infra* and the accompanying text.

most if he "followed the wrong scent" by preferring New York to Strasbourg. The European States would be overdoing it if they were to establish themselves as protectors, even well intentioned, of the *procedural* interests of persons under their jurisdiction. It does not seem that they should deny to such persons freedom to choose between the two procedures.[69]

The same cannot be said of duplication, the dangers of which have already been stressed.[70] As we have shown above, duplication is prevented by the Convention in the case of "New York followed by Strasbourg." To avoid duplication in the opposite direction, a declaration *or* reservation might be used.

One could think first of a *declaration* appended by the various European States to their instruments ratifying the Optional Protocol. This declaration would indicate that in these States' view article 5, paragraph 2 (a), applies not only in every case of *litispendentia*[71] but also—subject to "relevant new information"—after closure of the other "procedure of international investigation or settlement" devoted to the examination of "the same matter."

Unfortunately, such a declaration of interpretation would not be an absolute bar to negative conflicts of jurisdiction.[72] Moreover, the

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69. *Contra,* Khol, *supra* note 39, at 190-91. In November and December, 1966, ten Member States of the Council of Europe supported recognition of a right of individual communication at meetings of the Third Committee of the United Nations General Assembly. (These States were: Austria, Belgium, Denmark, France, Iceland, Ireland, Norway, Netherlands, Sweden and the United Kingdom.) All of them except France—which has not even ratified the Convention—have accepted the Strasbourg Commission's competence to deal with individual applications.

70. *See mutatis mutandis* section I (A)(3) *supra.* Commenting on the possible "differences in assessment" between the New York Committee and the Strasbourg organs, Tardu suggests that "appropriate mutual consultation" would very much reduce the risk of "conflicts of evaluation." Tardu, *supra* note 34, at 607-10, 621-25. Whatever the position under the Covenant, Optional Protocol and future rules of the New York Committee, the fundamental principle of secrecy of deliberations would seem to forbid the Strasbourg Commission and Court to engage in real consultations about pending cases with the Committee in hope of preventing contradictory findings. *Cf.* Court Rule 19; Rules of Procedure of the European Commision of Human Rights 27 [hereinafter cited as Commission Rules], in COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, COLLECTED TEXTS ch. 2 (1971). What could perhaps be done would not exceed an exchange of mere information on the existence and general content of a given application or communication, the stage of the proceedings, etc. These reciprocal "measures for obtaining information" (see the title to Court Rule 38 referred to by Tardu) would hardly suffice to produce a fully satisfactory result. In the final analysis, therefore, Tardu's reflections appear to furnish additional evidence of the need to avoid duplication of proceedings.

71. *See* text accompanying note 65 *supra.*

72. *See* text following note 65 *supra.*

New York Committee would have difficulty verifying the admissibility of an individual communication under article 5, paragraph 2 (a), in combination with the declaration concerned. Would it be content with the silence or unilateral assertions of the complainant? Would it demand an attestation from the respondent State[73] or the Commission?[74] Would it ex officio ask that State, or the Secretariat General of the Council of Europe, to supply it with the necessary information? The wording of article 5, paragraph 2 (a) ("unless it has ascertained"), appears to suggest that the Committee would be under an obligation to take an active role, but it might be useful to try to secure guarantees in this respect.[75]

Moreover, the New York Committee might not feel bound by an interpretation contrary to a clear text. In actual fact, article 5, paragraph 2 (a), deals solely with *litispendentia;*[76] it would be pointless to strive at lending it a meaning it does not bear. Consequently, a mere declaration would only provide a hazardous solution.

Reservations would be necessary if consideration of "matters" previously raised in Strasbourg were to be removed more surely from the competence of the New York Committee.[77] They would cover the Convention, as well as its existing and future Protocols, and specify how the European States understand the phrase "the same matter."[78] They should be deemed "compatible with the object and purpose" of the Optional Protocol, for they would be in harmony with the spirit of article 5, paragraph 2 (a), of this Protocol, article 44 of the Covenant and article 33 of the San Francisco Charter.[79]

Certain discussions which took place in the Third Committee of the United Nations General Assembly have been thought to cast

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73. This State would not necessarily know of an application introduced against it in Strasbourg. *See* Commission Rule 45.

74. As a rule, the Commission's proceedings are secret. *See* Convention, art. 33. *Cf. mutatis mutandis supra* note 70.

75. Conversely, how would the Strasbourg Commission verify compliance with article 27, paragraph 1*b*, of the Convention? The New York Committee's proceedings would as a rule be secret and the respondent State would not necessarily know of a communication lodged against it. *See* Optional Protocol, arts. 5, para. 3 and 4, para. 1 (opening words); *cf. mutatis mutandis supra* note 70.

76. *See* text accompanying notes 63-65 *supra.*

77. *See* J. De Meyer, *supra* note 29, at 95-96; Marcus-Helmons, *supra* note 41, at 98.

78. *See* text following note 68 *supra.*

79. *See also mutatis mutandis* section I (A)(3) *supra.* There is, of course, no question of invoking the letter of these provisions, as Tardu apparently believes is done. Tardu, *supra* note 34, at 610.

doubt on the validity of such reservations.[80] Quite apart from the rather limited use to be made of the *travaux préparatoires*,[81] the documents referred to in this connection are of only indirect relevance because they concern the actual text of article 5, paragraph 2 (a), of the Optional Protocol and of article 44 of the Covenant, not the admissibility of reservations about which both of these instruments remain silent. The question would have to be settled in accordance with "customary international law, as codified to some extent by articles 19 to 23 of the Vienna Convention on the Law of Treaties."[82] If their partners—potential or actual—raised too many and strong objections, the European States might in practice be led either to refrain from ratifying the Optional Protocol, or to denounce it (article 12). We trust that so unfortunate a situation—for which they could in no way be blamed considering their far-reaching regional achievements—is highly unlikely to occur.

The reservation advocated here would not of itself dispose of all problems (negative conflicts of jurisdiction, exchange of information between the New York Committee and the Strasbourg Commission), and it would be wrong to shut our eyes to this fact. It would, however, constitute the least harmful solution.

4. *Decision of the Committee of Ministers.*

In May 1970:

> The Committee of Ministers . . . agreed that the acceptance of the Optional Protocol to the United Nations Covenant on Civil and Political Rights by States which . . . accepted the right of individual petition under the European Convention would produce the result that an individual who alleges violation of a right guaranteed both by the European Convention and by the United Nations Covenant would have the choice of initiating proceedings under either procedure. The Committee considered it reasonable that the individual should have such a choice. The Committee also considered, on the

80. Tardu, *supra* note 34, at 610 (to be read in conjunction with pages 602-06).

81. *See, e.g.*, United Nations Convention on the Law of Treaties, arts. 31, 32, U.N. Doc. A/CONF.39/27 (1969).

82. Tardu, *supra* note 34, at 610. Special attention should be paid to article 20, paragraph 4(b) ("an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State") and article 21, paragraph 3 ("When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation"), of the Vienna Convention.

other hand, that an applicant should not be able to bring the same case under both procedures either at the same time or successively.

In order to prevent the possibility of successive applications to the European Commission and the U.N. Committee, member States of the Council of Europe which sign or ratify the Optional Protocol might wish to make a declaration, at the moment of signing or ratifying, whose effect would be that the competence of the U.N. Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention. Indeed, Article 5(2) of the U.N. Optional Protocol already contains a provision partially to this effect. Such a declaration should only cover complaints of violations of rights which in substance are covered by the two instruments, and not complaints of violation of rights not guaranteed in the European Convention.

The Committee of Ministers . . . therefore decided to transmit to member States a text drafted by the Committee of Experts on these lines, so that Governments may use it, if they wish, either as a declaration of interpretation or as a reservation, when ratifying the Optional Protocol to the U.N. Covenant on Civil and Political Rights.[83]

Thus the Committee of Ministers is of the opinion that private persons should be free to choose New York instead of Strasbourg if they so desire. It restricts itself to expressing its anxiety to avoid duplication of proceedings. To that end, it advises Member States to insert either a declaration of interpretation or a reservation into their instruments of ratification of the Optional Protocol. It does not indicate whether or not it holds the latter solution to be better than the former, nor which meaning it would like to see given to the words "the same question" in article 5, paragraph 2 (a), of the Optional Protocol.

C. *The Possible Duplication of an Application by a State and an Individual Communication*

What would happen if the same case were brought before the Strasbourg Commission by a State acting in pursuance of article 24 of the Convention, and before the New York Committee by an individual availing himself of the Optional Protocol?[84] The State application

83. Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 22-23, 4 Docs. (1970-71). The two Member States which had ratified the Optional Protocol as of September 30, 1972, had made a reservation rather than a declaration of interpretation.

84. The converse hypothesis (an individual application and a communication by a State) would in principle be ruled out from the start if the European States undertook not to have recourse to the New York Committee *inter se*. *Cf.* text following note 39 *supra*. *See also* Khol, *supra* note 39, at 184.

would meet on that account with no obstacle in either the Convention or the Covenant.[85] As for the communication, would it be dismissed by the New York Committee under article 5, paragraph 2 (a), of the Optional Protocol? It does not seem so: the two bodies really would not be taking cognizance of "the same matter" unless the complainant State had recourse to Strasbourg not for the sake of its own rights or of the general interest, but exclusively in defense of the rights of the person who had appealed to New York. This might be one more reason to wish that the European States should specify, preferably by means of reservations, their understanding of the words "the same matter." The Committee of Ministers does not appear to have paid attention to this particular question.[86]

II. The Normative Aspect

Close comparison of the normative clauses of the Covenant with those of the Convention and Protocols indicates both similarities and a number of occasionally striking differences. As this work has already been carried out in great detail by others, including the Committee of Experts whose report on this subject was made public by the Committee of Ministers in June 1970,[87] a few summary indications of the differences will suffice.

Let us notice first that the Covenant aims at protecting several rights about which the Convention and Protocols do not say a single word:

(1) all peoples' right "of self-determination" and of free disposal "of their natural wealth and resources" (article 1);
(2) right of everyone deprived of his liberty to be "treated with humanity and with respect for the inherent dignity of the human person" (article 10);[88]
(3) everyone's right "to recognition everywhere as a person before the law" (article 16);[89]

85. *See* text accompanying notes 30-32 *supra.*

86. Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 21-23, 53-54, 4 Docs. (1970-71).

87. Council of Europe Doc. H (70) 7 (1970); Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 22, 4 Docs. (1970-71). *See also* Modinos, *supra* note 6, at 57-64; J. De Meyer, *supra* note 29, at 24-83; Danelius, *Which Rights Should Be Protected?,* Report submitted to the Vienna Parliamentary Conference on Human Rights of October 1971, Council of Europe Doc. AS/Coll. DH (71)3 (provisional ed. 1971).

88. On the guarantees offered by the Convention in this connection, see Council of Europe, Secretariat, Human Rights in Prison (Case-law topics ser.) (1971).

89. *See* the explanatory report on Protocol No. 4 to the Convention, Council of Europe Doc. H (65) 16, para. 35 (1965).

(4) prohibition of "any propaganda for war" and "of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (article 20);[90]
(5) the family being entitled "to protection by society and the State" (article 23, paragraph 1);[91]
(6) the right of every child to "measures of protection," to a name and to a nationality (article 24);[92]
(7) right of every citizen "to take part in the conduct of public affairs" and "to have access, on general terms of equality, to public service in his country" (paragraphs (a) and (c) of article 25);[93]
(8) equality before the law (article 26);[94]
(9) rights of persons belonging to ethnic, religious or linguistic minorities (article 27).[95]

Conversely, three rights guaranteed at the European level are not covered by the Covenant: the right to peaceful enjoyment of one's possessions (article 1 of Protocol Number 1), the right to education (first sentence of article 2 of the same Protocol)[96] and a national's right not to be expelled from the territory of his State (article 3, paragraph 1, of Protocol Number 4).

Rights appearing on both the "universal" and the "European" lists are rarely defined in identical terms.[97]

While many of these drafting differences are probably of little

90. *See* Eur. Consult. Ass., 17th Sess. (3d Part), TEXTS ADOPTED, Recommendation 453 (1966); Committee of Ministers, Resolution (68) 30 (1968).

91. *But see* Council of Europe, European Social Charter, arts. 4, para. 1 and 16, 17 19, E.T.S. No. 35 (1961).

92. *But see id.* at arts. 7, 9, 10, 17.

93. *See* Eur. Consult. Ass., 11th Sess., Doc. No. 1057 at 8, para. 6, 6 Docs. (1959); Eur. Consult. Ass., 21st Sess., Doc. No. 2703 at 29-31, paras. 90-92, 96-98, 12 Docs. (1969-70); Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 15, 4 Docs. (1970-71); Eur. Consult. Ass., 21st Sess. (3d Part), TEXTS ADOPTED, Recommendation 583, para. 8 (1970).

94. *See* Council of Europe Doc. H (65) 16, paras. 36-37 (1965); Eur. Consult. Ass., 21st Sess., Doc. No. 2703 at 26-28, paras. 81-87, 12 Docs. (1969-70); Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 15, 4 Docs. (1970-71); Eur. Consult. Ass., 21st Sess. (3d Part), TEXTS ADOPTED, Recommendation 583, para. 8 (1970).

95. *See* Eur. Consult. Ass., 11th Sess., Doc. No. 1057 at 8, § 6, 6 Docs. (1959); Eur. Consult. Ass., 21st Sess., Doc. No. 2596, 4 Docs. (1969-70); Eur. Consult. Ass., 13th Sess., TEXT ADOPTED, Recommendation 285 (1961). *See also* item 2211/3 of the 1971-72 intergovernmental work program of the Council of Europe.

96. *But see* International Covenant on Economic, Social and Cultural Rights, 21 GAOR Supp. 16, at 49, arts. 13, 14, U.N. Doc. A/6316 (1966).

97. *But compare* Covenant, art. 12, para. 2 *with* Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, para. 2 (1963).

consequence,[98] others seem rather significant. In many fields, the Covenant will impose heavier obligations than the European instruments, regarding:

(1) the conditions for imposing and executing the death penalty (article 6, paragraphs 2, 4 and 5, of the Covenant; article 2, paragraph 1, of the Convention);

(2) medical or scientific experimentation on the human person (second sentence of article 7 of the Covenant; article 3 of the Convention);

(3) work required of detainees (article 8, paragraph 3 (c) (i), of the Covenant; article 4, paragraph 3 (a), of the Convention);

(4) expulsion of aliens (article 13 of the Covenant; article 4 of Protocol Number 4);[99]

(5) the right to a good administration of justice, particularly in criminal matters (right of appeal, indemnification of victims of judicial errors, *ne bis in idem,* etc.: paragraphs 3, subparagraphs (b) and (g), 4, 5, 6 and 7 of article 14 of the Covenant; article 6, paragraph 3, of the Convention);[100]

(6) the right to the benefit under new criminal law of a lighter penalty (article 15, paragraph 1, of the Covenant; article 7, paragraph 1, of the Convention);[101]

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98. *See* Covenant, art. 2, paras. 1, 3 and Convention, arts. 13-14; Covenant, art. 5, para. 1 and Convention, art. 17; Covenant, art. 7 (first sentence) and Convention, art. 3; Covenant, art. 8, para. 1 and Convention, art. 4, para. 1 (slave trade); Covenant, art. 9, para. 1 (first sentence) and Convention, art. 5, para. 1 (first sentence) (French text: *sécurité and sureté*); Covenant, art. 9, para. 2 and Convention, art. 5, para. 2; Covenant, art. 14, para. 1 (first and second sentences) and Convention, art. 6, para. 1 (first sentence); Covenant, art. 14, para. 2 and Convention, art. 6, para. 2; Covenant, art. 14, para. 3(a), (e), (f) and Convention, art. 6, para. 3*a, d, e*; Covenant, art. 15 (excluding last sentence of paragraph 1) and Convention, art. 7.

99. *But see* European Convention on Establishment, art. 3, E.T.S. No. 19 (1955). *See also* Eur. Consult. Ass., 11th Sess. (Part 3), Doc. No. 1057 at 11, para. 12, 6 Docs. (1959); Council of Europe Doc. H (65) 16, paras. 31-34 (1965).

100. As regards: (1) the right of appeal, see the Strasbourg Commission's decision on the admissibility of Application No. 2366/64, 10 Y.B. 216 (1967); (2) reparation for damage caused by judicial error, see the decision on the admissibility of Application No. 1473/62 (unpublished) (1963) and Council of Europe Doc. CDH (68) 3 at 16, 17, 19 (confidential) (1968); (3) the *ne bis in idem* principle, see decisions on the admissibility of Application No. 1519/62, 6 Y.B. 348 (1963), and Application 4212/69, 35 COLL. OF DECISIONS OF THE EUR. COMM'N. OF HUMAN RIGHTS 153-54 (1969); Council of Europe Docs. DH (63) 8 at 6-7 (1963) and DH (67) 2 at 5 (1967); European Convention on Extradition, art. 9, E.T.S. No. 24 (1957); European Convention on the International Validity of Criminal Judgments, arts. 53-55, E.T.S. No. 70 (1970).

101. *See* the decisions on the admissibility of Application No. 192/56 (unpublished) (1956) and Application No. 327/57 (unpublished) (1958): question left unanswered.

(7) the right to respect for private and family life (attacks on one's honor and reputation: article 17, paragraph 1, of the Covenant; article 8, paragraph 1, of the Convention) ;[102]
(8) freedoms of expression, assembly and association (articles 19, 21 and 22 of the Covenant; articles 10, 11 and 16 of the Convention) ;[103]
(9) freedom of consent of intending spouses and equality of husband and wife as to marriage (article 23, paragraphs 3 and 4, of the Covenant; article 12 of the Convention) ;
(10) political rights (article 25, paragraph (b), of the Covenant; article 3 of Protocol Number 1) ;
(11) derogations authorized in the event of public emergency threatening the life of the nation (article 4 of the Covenant, especially paragraph 2; article 15 of the Convention), etc.

On the other hand, the Covenant proves less generous than the Convention and Protocols on the following subjects:[104]

(1) on the right to life, subject to what has been said above (article 6 of the Covenant; article 2 of the Convention) ;
(2) on the right to liberty (articles 9 and 11 of the Covenant; article 5 of the Convention and article 1 of Protocol Number 4) ;
(3) on the right to enter the territory of one's own State (article 12, paragraph 4, of the Covenant; article 3, paragraph 2, of Protocol Number 4) ;
(4) on the admissible limitations on everyone's right to respect for his private and family life and on freedom to manifest one's religion or beliefs (articles 17 and 18, paragraph 3, of the Covenant; paragraph 2 of articles 8 and 9 of the Convention), etc.[105]

Whatever their exact extent, do these discrepancies between the texts create a risk of conflicting international rules? Article 5, paragraph 2, of the Covenant and article 60 of the Convention seem to avert any such danger.

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102. *But see* Velu, The European Convention on Human Rights and the Right to Respect for Private Life, Home and Communications, Report to the Brussels Colloquy of October 1970, Doc. H/Coll. (70) 1 at 28-30 (provisional ed. 1970).

103. Zanghi, *La liberté d'expression dans la Convention européenne des Droits de l'Homme et dans le Pacte des Nations Unies relatif aux droits civils et politiques*, 1970 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 573-89.

104. Without prejudice to note 109 *infra*.

105. *See also* the general standard of article 18 of the Convention (abuse of power) which has no equivalent in the Covenant.

Article 5, paragraph 2, of the Covenant

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the . . . Covenant pursuant to law, conventions, regulations or custom on the pretext that the . . . Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 60 of the Convention

> Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

While the Convention of November 4, 1950 certainly figures among the "conventions" mentioned in article 5, paragraph 2, of the Covenant, it is not clear that the Convention treats the Covenant similarly. One might contend that article 60 refers solely to laws and agreements existing at the time of its signature, ratification or entry into force. In support of this view, it could be pointed out that article 60 uses the present tense ("is a Party") and not the future (for example, "is or will become a Party"). Such an argument would not be convincing. Highly disputable in itself,[106] it would also lead to consequences so absurd that it would prove untenable: it would result in removing from the ambit of article 60 not only the two Covenants of December 16, 1966, but also quite a few European conventions like the Social Charter of October 18, 1961. Since the Council of Europe aims at the "further realization" of human rights in addition to their "maintenance,"[107] it would be hard to understand why a convention drawn up under its auspices should claim to prevent Member States from going ahead in this field.

It would seem to follow that the Convention will not restrict the scope of the Covenant, and vice versa.[108] The more favorable provisions of the Covenant, however, will not be incorporated in the European

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106. A vast majority of the articles of the Convention are in the present tense in their French text. There are, however, a few exceptions, one being the opening phrases of article 60 *(ne sera interprétée). Compare with* section I (A) (2) (a) *supra* (art. 62).

107. The Statute of the Council of Europe, art. 1; Convention, Preamble.

108. This opinion is shared by the Committee of Experts on Human Rights. Council of Europe Doc. H (70) 7 at 23, para. 84 (1970).

system of protection.[109] Article 60 confines itself to prohibiting that the Convention be "construed" as relieving Contracting States from heavier obligations undertaken or to be undertaken by them under domestic law or international agreements; it would be wrong to conclude that a breach of these obligations would of itself infringe the Convention.[110]

Yet, what about article 15, paragraph 1, of the Convention, according to which measures of derogation must not be "inconsistent with . . . other obligations under international law"?[111] If by any chance a State derogated from the Convention but not from the Covenant, it might be necessary to scrutinize the meaning of the term "international law": in the present context, does this term refer exclusively to general international law, or does it embrace all international commitments of each of the Contracting States, including possibly the Covenant? Without expressing an opinion on the point, we should note that the latter view is more in keeping with the wording of article 15,[112] although its adoption would entail inequality of treatment between those States.[113]

One could even conceive of asserting that it would be paradoxical if the Convention were less stringent in normal times than in those

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109. *Id.* at 23, para. 85. Incidentally, article 5, paragraph 2, of the Covenant is perhaps less clear than article 60 of the Convention in this respect: *"There shall be no* restriction upon or derogation from . . . ."

110. The Strasbourg Commission considers that it is not for it "to check on the proper administration of municipal law" save "in matters where the Convention refers" to that law. *See, e.g.,* App. No. 1169/61, 6 Y.B. 588 (1963). On the other hand, the draft prepared by the European Movement in July, 1949, contained (together with an article 4 comparable to article 60 of the Convention) an article 6, paragraph (b), which read as follows:

> Any additions to the above-mentioned rights which may be effected after the signing of [the] Convention as a result of changes in law or administrative practice shall, as from the date of such changes, be guaranteed in the same manner as the rights existing at the date of the signing of [the] Convention by the State concerned.

Doc. INF/5/E/R at 8 (1949).

111. *Compare with* Covenant, art. 4, para. 1.

112. *Cf.* the maxim: *Ubi lex non distinguit, nec nos distinguere debemus* (Where the law does not distinguish, neither ought we to distinguish). *Compare* Convention, art. 15 ("international law") *with* Convention, arts. 26 and 7, para. 2 ("generally recognised rules of international law" and "general principles of law recognised by civilised nations") *and* Protocol No. 1 ("general principles of international law"). The European Court has not yet had occasion to decide the issue. *See* "Lawless" Case, 4 Y.B. 480-82, paras. 39-41 (1961).

113. The Convention creates or tolerates many such inequalities by its numerous references to the national legislations, its optional clauses and the reservations it authorizes. Article 15 would therefore have nothing unusual in this respect.

circumstances of extreme gravity—war or public emergency threatening the life of the nation—when article 15 requires compliance with "other obligations under international law." Notwithstanding its appealing logic, this reasoning would strain the letter and spirit of the Convention.[114] If one were to approve of it, the Commission, Court and Committee of Ministers would face a considerable increase in work: it would be their permanent function to supervise the observance of innumerable international rules; the Strasbourg Commission has found itself incompetent to do this.[115]

III. The Links Between the Procedural and Normative Aspects

Having thus seen that the normative aspect of the matter of "coexistence" proves less delicate than the procedural one, we shall now examine the close connection between the two elements and the arbitrariness of attempting to disassociate them. There is a risk that questions relating to the merits may make problems of implementation more acute, notwithstanding the relative simplicity of the former and the precautionary measures suggested to solve the latter. The Convention and its Protocols do not guarantee some of the rights which the Covenant seeks to protect; where the two catalogs coincide, the "universal" definition is sometimes more liberal than the "European." One might contend that this is a factor likely to encourage States—and to an even greater extent individuals—to turn to the New York Committee rather than to the Strasbourg Commission.

On another line of thinking, it will be recalled that several States consider the Convention an integral part of their internal law and attribute to it a self-executing character.[116] Assuming that in their view the same is true of the Covenant,[117] their courts would have to apply this in-

114. The said reasoning was developed at least once before the Strasbourg Commission. Unfortunately, the relevant documents have not been made public.

115. Decisions on the admissibility of Applications Nos. 1821/63 and 1822/63, 9 Y.B. 230 (1968) and of Application No. 5459/72 (to be published shortly in volume 40 of *Collection of Decisions of the European Commission of Human Rights*). *See also* Sorensen, *La recevabilité de l'instance devant la Cour européenne des Droits de l'Homme*, in 1 René Cassin Amicorum Discipulorumque Liber 338 (1969).

116. *See, e.g.*, Buergenthal, *The Domestic Status of the European Convention of Human Rights*, 13 Buffalo L. Rev. 354 (1964); Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States*, Supp. No. 11 Int'l & Comp. L.Q. 79 (1965); Buergenthal, *The Domestic Status of the European Convention of Human Rights: A Second Look*, 1966 J. Int'l Comm. Jur. 55.

117. *See* J. De Meyer, *supra* note 29, at 7-12; Covenant, arts. 2, paras. 1 & 2, 40, paras. 1 & 2.

strument concurrently with the Convention and with ordinary domestic legislation. They would presumably give preference to those clauses which are most favorable to the individual, but they would first have to identify these clauses. We believe that such a task would present them with a very thorny problem.[118]

The European States would eliminate this double difficulty if they were to fill in the "normative gap" which remains between the Convention and Covenant. By means of Protocol Number 4 of September 16, 1963, they closed the initial margin to a considerable extent, and they did so intentionally without awaiting the actual adoption of the Covenant;[119] yet they have not eliminated it altogether. It would therefore be desirable that they study the possibility of a new Protocol designed to:

(1) include in the European system those individual rights which are not presently covered there and protection of which is provided for in the Covenant; and
(2) harmonize the "European" definition of the rights already written into the Convention and Protocols with their "universal" definition, insofar as the latter tends to secure a better safeguard for human beings.

We should not, however, delude ourselves with vain hopes. The governments have declined to insert in Protocol Number 4 texts concerning equality before the law and everyone's right to the recognition of his legal personality;[120] and enlightened jurists have been conscious for a long time of the need to bring the "European" definitions into line with the "universal" wherever that would mean progress. Thus the Chairman of the Consultative Assembly's Legal Committee, Mr. Hermod Lannung, observed in 1958:

> The "universal" definition . . . seems, in certain cases, to go further than the "European." Probably the Council of Europe will sooner or later have to adapt the second to the first insofar as the latter is more liberal. It would perhaps be premature to go into this problem at present, but it would be fitting to bear it in mind and consider means of solving it when the time comes.[121]

118. *See* J. DE MEYER, *supra* note 29, at 22-23; Modinos, *supra* note 6, at 66.

119. *See* Eur. Consult. Ass., 11th Sess. (3d Part), Doc. No. 1057 at 7, para. 5, 6 Docs. (1959); Council of Europe Doc. H (65) 16 *passim* (1965).

120. *See* Council of Europe Doc. H. (65) 16, paras. 35-37 (1965).

121. Council of Europe Doc. AS/Jur XII(10)1 (extract produced by Modinos, *supra* note 6, at 57 n.32. *See also* 2 TRAVAUX PRÉPARATOIRES 476-77 (1950); 4 TRAVAUX PRÉPARATOIRES 1017 (1950); Khol, *supra* note 39, at 191.

What was then deemed to be premature has clearly ceased to be so now. If the governments were prepared to confront the consequences, if they did not hesitate to elaborate a sixth Protocol of which the drafting and entry into force would require years and which would impose upon them additional obligations accompanied by a system of supervision stricter than its universal counterpart, they could be more certain of avoiding the "short-circuiting" of the Strasbourg organs and of helping the indisputable institutional superiority of the Convention to come to full fruition.[122] Without in any way neglecting their duties towards the United Nations, they would consolidate and complete the edifice they built in Rome on November 4, 1950. They would demonstrate once more that the Convention is of a "forward-looking nature" and that not content to leave "room for bolder or more generous conceptions,"[123] it is continuously regenerating itself. It is to be hoped that they will not surrender to the temptation of doing what demands the least effort.

On July 8, 1971, the Consultative Assembly of the Council of Europe—or more precisely, the Standing Committee acting on its behalf[124]—adopted Recommendation 642 "on the ratification of the United Nations Covenants on Human Rights."[125] "Aware" of the "important questions" raised by "the co-existence of the U.N. Covenant on Civil and Political Rights and its Optional Protocol and the European Convention on Human Rights," it welcomed both "the study made of these questions by the Committee of Experts on Human Rights" and Resolution (70) 17 of the Committee of Ministers. It went on to express its belief "that the completion of this study [had] indicated the measures necessary to remove the difficulties which might arise, and thus [made] it possible for member States to ratify the United Nations texts." It also declared itself "convinced that the two systems of protection of Human Rights, regional and universal, are not conflicting but complementary."

After noting that only one member State of the Council of Europe,

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122. Whether or not they intend to do so does not emerge from the Committee of Ministers' decisions of May and June, 1970, insofar as they have been made public. Eur. Consult. Ass., 22d Sess., Doc. No. 2795 at 22-23, 53-54, 4 Docs. (1970-71).

123. Eur. Consult. Ass., 11th Sess. (3d Part), Doc. No. 1057 at 6-7, para. 2, 6 Docs. (1959).

124. Eur. Consult. Ass., Rules of Procedure, 32, para. 4 and 46, paras. 4, 6, 7.

125. *See also* the corresponding report of the Legal Affairs Committee, Eur. Consult. Ass., 23d Sess., Doc. No. 2962, 3 Docs. (1971-72).

Cyprus, had ratified the Covenant, and that none had ratified the Optional Protocol,[126] the Assembly recommended

> that the Committee of Ministers invite member States (other than Cyprus) to ratify as soon as possible the U.N. Covenant on Economic, Social and Cultural Rights,[127] the U.N. Covenant on Civil and Political Rights, and the Optional Protocol thereto,[128] taking account of the recommendations made by the Committee of Ministers concerning the problems that might arise owing to the coexistence of the U.N. Covenant[129] and the European Convention on Human Rights.

The Consultative Assembly—with whom the Committee of Ministers generally expressed agreement in January, 1972[130]—thus marked its high appreciation of the United Nations Covenants. Its very positive attitude seems the more striking and significant as Recommendation 642, of July 8, 1971, originated in a motion tabled on December 7, 1970,[131] *i.e.*, later than a motion of September 24, 1970, "on the ratification of the European Convention on Human Rights by all member States," about which the Legal Affairs Committee has so far submitted no report.[132] That the Assembly thereby granted priority, in a way, to another organization's offspring over its own child may be considered somewhat paradoxical and surprising, but it certainly constitutes a

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126. *See* note 10 *supra.*

127. Without awaiting the outcome of the study noted in note 15, *supra. See* Eur. Consult. Ass., 23d Sess., Doc. No. 2962 at 16-71, paras. 27-29, 3 Docs. (1971-72); *see also* note 129 *infra.*

128. Taken literally, Recommendation 642 could give the impression that the Assembly does not want member States to issue the declaration provided for in article 41 of the Covenant, nor Cyprus to ratify the Optional Protocol. Of course, this is not the case and the absence of express indications on these items is to be ascribed solely to an oversight on the part of the drafters.

129. French text: *"des Pactes."* Since the draft recommendation appearing in the report of the Legal Affairs Committee used the plural in both official versions (document 2962, *supra* at note 125) it may be assumed that a misprint occurred subsequently in the English version. It should be noted, however, that there were as of July 8, 1971, are at present (September 1972), and probably will be no recommendations of the Committee of Ministers about the coexistence of the Covenant on Economic, Social and Cultural Rights with the Convention. The same does not apply to the coexistence of the said covenant with the European Social Charter (see note 15 *supra*), but no mention of this subject is to be found in Recommendation 642 which, here again, seems a bit imprecise.

130. Eur. Consult. Ass., 23d Sess., Doc. No. 3067 at 1-3, 13 Docs. (1971-72).

131. Eur. Consult. Ass., 22d Sess., Doc. No. 2862, 8 Docs. (1970-71).

132. Eur. Consult. Ass., 22d Sess., Doc. No. 2841, 7 Docs. (1970-71). The last recommendation aimed at *inter alia* the ratification of the Convention by France and Switzerland dates back to January 30, 1969. Eur. Consult. Ass., 20th Sess. (3d Part), TEXT ADOPTED, Recommendation 548 (1969).

gesture of genuine good will which must be applauded if it meets with reciprocity.

Was the Assembly right in forming an optimistic opinion as to the adequacy of the measures suggested to Member States by the Committee of Ministers? This is a slightly different matter. Only experience will show whether the decision which has been adopted will prove effective and sufficient, or whether further measures were, and if it is not too late, still are required by the prevailing circumstances.

(September 1972)